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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-92

AMERICAN HONDA MOTOR COMPANY, INC.

Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND THE TAX ASSESSOR-COLLECTOR OF THE CITY OF FARMERS BRANCH, TEXAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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AMERICAN HONDA MOTOR COMPANY, INC.

Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND THE TAX ASSESSOR-COLLECTOR OF THE CITY OF FARMERS BRANCH, TEXAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

Petitioner American Honda Motor Company, Inc., a California corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Supreme Court entered in this proceeding on May 5, 1976.

OPINIONS BELOW

The opinions of the Texas Supreme Court, in this and a companion case, printed in the Appendix, *infra*, p. A-1 and A-5 respectively, are not yet reported. The opinion of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District

(the Texas intermediate appellate court), printed in the Appendix, *infra*, p. A-10, is reported in 527 S.W.2d 776.

JURISDICTION

The judgment of the Texas Supreme Court, printed in the Appendix, *infra*, p. A-3, was entered on May 5, 1976, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Whether the standards announced and applied by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) must be applied by state courts in determining in civil cases whether to attach only prospective effect to decisions involving substantial reinterpretations or new interpretations of federal law.

(2) Whether the *Chevron* standards require that the interpretation of the Import-Export Clause by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) be applied prospectively only.

CONSTITUTIONAL PROVISION INVOLVED

The *Michelin* case (and *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), which it overruled) involved the construction of the part of the Import-Export Clause of U. S. CONST. art. I, § 10, cl. 2, which provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. . . .

STATEMENT OF THE CASE

The City of Farmers Branch and its Tax Assessor-Collector (herein collectively "Farmers Branch"), pursuant to TEX. REV. CIV. STAT. ANN. art. 1165 (1963), for the year 1972 imposed a non-discriminatory ad valorem personal property tax on American Honda Motor Company, Inc.'s ("American Honda") imported goods contained in "original packages" in its Farmers Branch warehouse. American Honda duly and regularly claimed, by timely and appropriate procedures, that the goods in question were exempt from taxation by virtue of the provisions of the Import-Export Clause.

American Honda then filed this action in the 134th Judicial District Court of Dallas County, Texas, asking that court to declare that the imposition of such taxes violated the Import-Export Clause and to enjoin their collection. Upon stipulated facts the trial court entered "Findings of Fact and Conclusions of Law" concluding expressly that certain of the goods in question at the time of taxation were "imports" and that a non-discriminatory ad valorem property tax on such goods was in violation of the Import-Export Clause.

The Texas Court of Civil Appeals affirmed concluding that:

> The rational of *Low* and *Hooven*[1] that all taxes, even non-discriminatory ad valorem taxes, are unconstitutional if imposed upon merchandise which retains its status as imports has been reaffirmed in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 76, 67 S.Ct. 156, 91 L.Ed. 80 (1946) and *Department of Revenue v. James Beam Distilling Company* [377 U.S. 341, 343 (1964)].

527 S.W.2d at 781-82. Farmers Branch then applied for a writ of error to the Texas Supreme Court. The writ was re-

[1]Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945).

fused on January 14, 1976,[2] the same day that this Court announced its decision in *Michelin v. Wages*, expressly overruling *Low v. Austin*. *Low* had held that non-discriminatory ad valorem taxes on imports were prohibited by the Import-Export Clause. Farmers Branch, on the strength of *Michelin*, applied for rehearing in the Texas Supreme Court. Since *Michelin* had just been decided, American Honda, opposing the application for rehearing, raised for the first time the issue whether *Michelin* should be applied prospectively only. American Honda argued that the applicable standards of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), required that *Michelin* be applied prospectively only and, except to that extent the judgment in this case should not be disturbed.[3]

The Texas Supreme Court nonetheless granted the application of Farmers Branch for writ of error on motion for rehearing and scheduled the case for oral argument. The sole question on which the writ was granted was whether the Farmers Branch non-discriminatory personal property ad valorem tax on American Honda's imports was in violation of the Import-Export Clause. American Honda, arguing for affirmance of the prior decisions, at oral argument and again in its post-argument brief urged the prospective application of *Michelin*.[4] The Texas Supreme Court rejected American Honda's argument on prospectivity and, relying on *Michelin*, reversed the lower court opinion and held that American Honda was "subject to the non-discriminatory ad valorem taxes assessed by Farmers Branch." Appendix, *infra*, p. A-2.

[2]The Texas Supreme Court refused the writ "no reversible error" meaning that though the Texas Supreme Court is not satisfied that the lower court stated the law correctly in all respects, the application presents no error which requires reversal. TEX. R. CIV. P. 483.

[3]See "Reply to Petitioners' Application for Rehearing" filed by American Honda with the Texas Supreme Court and printed in the Appendix, *infra*, p. A-25.

[4]See "Respondents' Reply to Petitioners' Brief" filed by American Honda with the Texas Supreme Court and printed in the Appendix, *infra*, p. A-33.

REASONS FOR GRANTING THE WRIT

1. THE STANDARDS PREVIOUSLY ANNOUNCED BY THIS COURT CONCERNING THE RETROACTIVITY OF DECISIONS INTERPRETING FEDERAL LAW MUST, AS A MATTER OF FEDERAL LAW, BE FOLLOWED BY STATE COURTS.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), clearly established in a civil context three factors which, if present, result in prospective application of this Court's decisions, namely:

> (1) that clear past precedent upon which litigants may have relied was overruled or that the decision was one of first impression whose resolution was not clearly foreshadowed;
>
> (2) that the purpose of the overruling case can be effected without retroactive application;
>
> (3) that retroactive application would produce substantial inequities.

The Texas Supreme Court did not apply those factors in this instance. For that matter, for the five years since *Chevron*, few state courts have treated those standards as necessary tests for determining the nonretroactivity of civil federal decisions. *Compare Hampton Nat'l Bank v. Desjardins*, 114 N.H. 68, 314 A.2d 654 (1974) *with In Re Negron*, 33 Ill. App. 3d 112, 337 N.E.2d 375 (1975). In the criminal area, on the other hand, state courts have clearly and repeatedly recognized that the standards announced in *Linkletter v. Walker*, 381 U.S. 618 (1965), for determining nonretroactivity of constitutional criminal decisions are binding. *See, e.g., People v. Livingston*, 64 Mich. App. 247, 236 N.W.2d 63 (1975);

Wiggins v. State, 275 Md. 689, 344 A.2d 80 (1975). Furthermore, *Chevron*, like *Linkletter*, has properly been regarded by many federal courts as a decision expressing mandatory standards to be applied in determining the prospectivity of civil decisions involving a change from previous clear judicial interpretations of federal law or first impression interpretations of federal law. *See, e.g., Jimenez v. Weinberger*, 523 F.2d 689, 702-03 (7th Cir. 1975); *Bush v. Wood Brothers Transfer, Inc.*, 398 F. Supp. 1030 (S.D.Tex. 1975); *Bergstrom v. Kissinger*, 387 F. Supp. 794 (D.D.C. 1974). *See also Brown v. United States*, 508 F.2d 618, 622-23 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975).

As it has in criminal cases this Court should pursue its supervisory function in the administration of justice by expressly requiring that state courts apply the *Chevron* prospectivity standards to all civil cases involving reversals of well-established federal principles. *Cf. Linkletter v. Walker*, 381 U.S. 618 (1965). When these principles are changed by any court there must be uniform standards by which all courts determine the retroactivity of such decisions. This is particularly true when, as in this case, the question concerns the retroactivity of a decision of this Court which reverses one of the Court's clear and longstanding constitutional monuments. The lack of such uniformity could result in chaos, raising the spectre of fifty state courts applying different standards and reaching differing results on the question of the retroactivity of this Court's important constitutional decision in *Michelin*.

The proper scope of *Chevron* is a question of federal law which should be addressed by the Court in a review by certiorari. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). On several occasions this Court has granted a writ of certiorari

to consider the prospectivity of an earlier announced rule. *See United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Estate of Donnelly*, 397 U.S. 286 (1970); *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969).

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision of the Texas Supreme Court flies directly in the face of the three standards established by this Court in *Chevron*.

Low v. Austin's absolute prohibition of ad valorem taxes on imported goods was the settled law for more than a century, having been cited with approval by this Court as recently as 1964. *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964). Certainly, the abrupt outright reversal of *Low* in *Michelin*, without brief or argument, established a new principle of law by overruling clear past precedent. Until the reversal in *Michelin*, American Honda and other American importers had a right to rely upon *Low* in ordering their business affairs with respect to locating warehouses, pricing goods, maintaining inventory levels, etc. In fact, American Honda, relying on established law, instituted this suit for declaratory and injunctive relief against the taxing authority and was vindicated at all levels of the Texas court system until *Michelin* triggered an abrupt reversal upon rehearing in the Texas Supreme Court. Thus, the first *Chevron* factor mandating prospective application is satisfied.

The Texas Supreme Court viewed American Honda's reliance on *Low v. Austin* as unjustified simply because Farmers Branch had levied its ad valorem tax before *Low* was reversed. In *Lemon v. Kurtzman*, 411 U.S. 192 (1973), this Court rejected similar arguments and applied its holding prospectively even

though the reimbursement scheme at issue was constitutionally suspect from its inception and reimbursement for the year in question had not occurred at the time that the questioned statute was declared unconstitutional by this Court. The reliance discussed by this Court in *Chevron* concerns reliance on judicial precedent and the development of pertinent case law. Reliance on case precedent does not become unjustified simply because a governmental official takes action in contravention of well-settled law that is later unexpectedly changed.

The second *Chevron* factor has also been satisfied, since the purpose of the *Michelin* decision can be effected without retroactive application to the present case. The primary purpose of *Michelin* is to allow local government agencies to impose ad valorem taxes and to thereby require ultimate consumers to pay for the benefits and services accorded the goods. As this Court noted in *Michelin*:

> ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods.

423 U.S. at ...., 96 S.Ct. at 542 (footnote omitted). In this case, however, the goods in question have long since been sold to the consuming public. A retroactive application, therefore, would reap a windfall in added revenues to taxing authorities without a corresponding increase, as *Michelin* intended, in the expenses of local services for past years nor a proper allocation of such burdens to the ultimate consumers.

Finally, since retroactive application of *Michelin* would produce substantial inequities, the third factor of *Chevron* is satisfied. If American Honda and similarly situated American importers are required to absorb all assessments of back taxes

(including presumably penalties and interest) within the applicable periods of limitation without any realistic means to pass on the increased costs to the ultimate consumers who benefited most from the goods, then in effect these importers are penalized because they relied upon precedents of this Court which had been valid for 104 years prior to the date of the *Michelin* decision.

3. The Questions Presented are of Substantial Economic Importance to American Trade and Commerce and to the Administration of Justice.

The potential tax liability of American Honda and other American importers in the event that *Michelin* is applied retroactively is potentially enormous although presently incapable of definite determination. We have attempted to secure data as to the amount of tax dollars involved nation-wide if *Michelin* is applied retroactively, but without success because of the existence of a multitude of taxing entities and the resulting absence of any over-all governmental authority or other source of over-all information. This potential back tax liability is limited only by state statutes of limitations which can reach back as far as seven years. *See* Ga. Code Ann. §92-7701 (1974).

There is pressing need for a decision from this Court which will insure, beyond the four corners of this case, that the public in general, and members of the business community in particular, may make valid judgments as to their conduct based upon the existence of the law as stated by the highest Court of this nation. Under the very facts pertinent here, businessmen have elected to engage in business *knowing* that under *Low v. Austin* the purchase of goods from abroad subject only to usual customs duties justified entry into the market. It is not

only patently unfair but also damaging to principles of constitutional finality to make such business decisions *retroactively* invalid because this Court later changed the law on so well-settled a matter. The failure of this Court to clarify the retroactivity issue in the civil context could result in great confusion and inconsistency.[5] Faith in Supreme Court mandates must diminish if the standards for their present application are not clearly delineated. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (1921). Members of the public must know that they may confidently and justifiably make decisions based upon the law announced by this Court. If such law is later changed, future conduct must change, to be sure. But that conduct which occurred in reliance upon existing precedent should be affected only under circumstances which are justified under the principles established in the *Chevron* case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,
MARVIN S. SLOMAN
PETER TIERNEY
Attorneys for Petitioner

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[5]Some commentators have focused on the confusion surrounding the retroactivity issue. *See, e.g.*, Rogers, *Perspectives on Prospective Overruling*, 36 U. MO. KANSAS CITY L. REV. 35 (1968). *See also* Hasler, *Retroactivity Rethought: The Hidden Costs*, 24 ME. L. REV. 1, 23 (1972); Friedland, *Prospective and Retrospective Judicial Lawmaking*, 24 U. TORONTO L.J. 170 (1974).

CERTIFICATE OF SERVICE

I, Marvin S. Sloman, counsel for American Honda Motor Company, Inc., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 29, 1976, I served three copies of the foregoing petition for writ of certiorari on the respondents herein by hand-delivering the same to Ronald M. Mankoff, Esq., counsel of record for the respondents, at his office at 3900 First National Bank Building, Dallas, Texas. I further certify that all parties required to be served have been served.

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APPENDIX

1. Opinion of the Texas Supreme Court.

In the

Texas Supreme Court

No. B-5550

CITY OF FARMERS BRANCH, TEXAS,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,

Respondents.

Appeal from the Texas Court of Civil Appeals
for the Twelfth Supreme Judicial District

May 5, 1976

This is a companion case to our Cause Number B-5551, City of Farmers Branch v. Matsushita Electric Corp. of America, decided this day. _____ S.W.2d _____. The cases were submitted and argued together in this court.

The Honda warehouse in Farmers Branch stores parts and accessories for Honda automobiles, motorcycles, and outboard motors. The parts and accessories were imported from Japan

in sealed sea vans. As in *Matsushita*, Farmers Branch assessed ad valorem personal property taxes on these items for the year 1972. Honda declined to pay the tax and brought this suit for a declaratory judgment that the merchandise was tax-exempt under the import-export clause, Section 10 of Article I of the United States Constitution.

The questions are the same as those presented in *Matsushita*, and the disposition of those questions in *Matsushita* control the disposition of this cause.

The judgments of the trial court and the Court of Civil Appeals are reversed; the injunction entered by the trial court against the assessment and collection of the taxes is dissolved; and judgment is here rendered that Honda is subject to the non-discriminatory ad valorem taxes assessed by Farmers Branch.

/s/ JOE R. GREENHILL
Chief Justice

Opinion delivered:
May 5, 1976

2. Judgment of the Texas Supreme Court.

JUDGMENT

Extract from the Minutes of May 5, 1976

No. B-5550

CITY OF FARMERS BRANCH, TEXAS,

v.

AMERICAN HONDA MOTOR COMPANY, INC.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgment of the District Court and Court of Civil Appeals, it is, therefore, *adjudged, ordered* and *decreed* that said judgments be, and hereby are reversed and set aside.

And this Court now proceeding to render judgment as should have been rendered below, it is *considered, adjudged, ordered* and *decreed* that the judgment be, and hereby is, rendered that respondent, American Honda Motor Company, Inc. be, and hereby is, subject to the non-discriminatory ad valorem taxes assessed by the City of Farmers Branch and accordingly the injunction entered by the trial court against the assessment and collection of taxes be, and hereby is, dissolved.

It is further ordered that respondent, American Honda Motor Company, Inc., pay all costs expended and incurred in this Court, Court of Civil Appeals and District Court; that

petitioners, City of Farmers Branch et al., have and recover of and from respondent, American Honda Motor Company, Inc., the costs by them expended and incurred in said Courts, and that this decision be certified to the District Court of Dallas County, Texas, for observance.

(Opinion of the Court by Chief Justice Greenhill.)

3. Opinion of the Texas Supreme Court in related case, City of Farmers Branch v. Matsushita Electric Corp.

In the

Texas Supreme Court

No. B-5551

CITY OF FARMERS BRANCH, TEXAS,
Petitioners,

v.

MATSUSHITA ELECTRIC CORP. OF AMERICA,
Respondents.

Appeal from the Texas Court of Civil Appeals
for the Twelfth Supreme Judicial District

May 5, 1976

This case involves an interpretation of Section 10 of Article I of the Constitution of the United States, which provides in part that,

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . ."

The City of Farmers Branch assessed a nondiscriminatory ad valorem tax on merchandise stored in warehouses within

its limits. In 1972, it assessed such a tax on the merchandise here in question. It had been imported from Japan and Puerto Rico and was the property of Matsushita Electrical Corporation of America, a wholly owned subsidiary of a Japanese corporation of a similar name.

The property had come to its destination in Farmers Branch, but was still in its original corrugated cartons. Matsushita declined to pay the tax. In this declaratory judgment suit, its contention is that the tax on its property is unconstitutional under the above provision of the Constitution of the United States.

Because of the earlier decision of the Supreme Court of the United States which this court is bound to respect, we at first upheld the position of Matsushita. The Court of Civil Appeals had held the property was not subject to taxation by the city, and we upheld that decision by refusing a writ of error with a notation, "no reversible error." 527 S.W.2d 768. Upon the same day upon which our court acted, January 14, 1976, the United States Supreme Court announced its decision in *Michelin Tire Corporation v. Wages*, _____ U.S. _____, 96 S.Ct. 535, 46 L.Ed.2d 495. We thereafter granted a writ of error upon rehearing. It is our opinion that under *Michelin*, the tax of the City of Farmers Branch is not an unconstitutional tax. In the words of the *Michelin* decision, an ". . . assessment of a nondiscriminatory ad valorem property tax . . . is not within the constitutional prohibition against laying any imposts or duties upon imports . . ."

The property which is the subject of the tax consists of Panasonic units and parts manufactured by or for Matsushita in Japan and Puerto Rico. The items were packed in sealed corrugated cartons and were shipped to the United States in

sea vans. After the sea vans reached their port of entry, they were shipped by rail to Fort Worth. The seals on the sea vans were broken at Matsushita's warehouse in Farmers Branch, and the individual cartons were there unloaded and stored. No manufacturing, repairing or servicing is carried on at the Matsushita warehouse. The warehouse is used only to store the merchandise until needed by retail dealers. The disputed items were all in their unopened corrugated cartons.

The "original package doctrine" had its origin in *Brown v. State of Maryland*, 25 U.S. 262 (1827), in which Chief Justice Marshall wrote:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive characteristic as an import, and has become subject to the taxing power of the state; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.*" [Emphasis supplied.]

Brown v. Maryland was enlarged upon in 1871 by *Low v. Austin*, 80 U.S. 29, which is characterized by the Supreme Court in *Michelin* as "the leading decision of the court that the States are prohibited by the Import-Export clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports . . ."

In *Michelin*, however, the Supreme Court, upon its own initiative, carefully reviewed the *Brown* and the *Low v. Austin* decisions; and it concluded that, "*Low v. Austin* was wrongly decided. That decision therefore must be, and is overruled."

We understand the holding of *Michelin* to be that where the tax is not upon the importation or movement of imported goods, and where the goods are no longer in transit, the goods

are subject to the imposition of nondiscriminatory ad valorem property taxation by the states and their subdivisions.

We agree with the Supreme Court that there is no reason why an importer should not bear his share of the cost of services such as police and fire protection along with his competitors who handle only domestic goods. As the Supreme Court said in *Michelin*, the Import-Export clause " . . . cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."

The ad valorem tax imposed by Farmers Branch is clearly nondiscriminatory and applicable to all such stored goods whether imported or not. The property of Matsushita is therefore subject to the tax.

In the alternative, Matsushita contends that because the Supreme Court changed the law in *Michelin* in 1976, that it should not be liable for taxes assessed for the year 1972 and beyond; i.e., that the *Michelin* decision should not be given retroactive effect, and that it should only be liable for taxes assessed after January 14, 1976, the date of the *Michelin* decision. We disagree for the following reasons.

First, the taxes assessed by Gwinnett County, Georgia, in the *Michelin* case were for the years 1972 and 1973, the same periods involved here. The Supreme Court upheld the judgment of the Supreme Court of Georgia that the taxes were valid, and at least by inference, that they were collectible. Michelin filed a motion for rehearing in the Supreme Court, and we were furnished with a copy of it. In the motion, Michelin limited its argument to the retroactive effect of the *Michelin* decision, and it urged the Supreme Court to declare its opinion to be prospective only because it had changed the law in effect

for 100 years. The Supreme Court overruled Michelin's motion.

Second, Matsushita contends that it is inequitable to apply the *Michelin* decision and our decision as applying to taxes assessed in 1972 because under *Low v. Austin* and other decisions, Matsushita and others then considered their goods exempt from taxation. At the same time, however, Matsushita was plainly informed and put upon notice by the City of Farmers Branch that the city considered that the goods were taxable, and that *Low v. Austin* and similar cases were wrongly decided and should be overruled. There is no basis for a contention that Matsushita relied on any previous action or non-action of the city because the city assessed the Matsushita property for taxes at its first opportunity.

And thirdly, the reasons for the collectibility of the nondiscriminatory tax as to Matsushita for the years in question are prominent in the *Michelin* decision. Matsushita's property during such period was afforded the same public services, including police and fire protection, as were afforded to their competitors and to others in the community; and there is no great inequity in their having to bear their same fair and equal share of such expense; i.e., the nondiscriminatory taxes assessed during such period.

The judgments of the trial court and the Court of Civil Appeals are reversed. The injunction issued by the trial court enjoining the assessment and collection of the taxes involved is dissolved; and judgment is here rendered that the merchandise in question was and is subject to the nondiscriminatory ad valorem personal property taxes.

/s/ JOE R. GREENHILL
Chief Justice

Opinion delivered:
May 5, 1976

4. Opinion of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District.

In the

Texas Court of Civil Appeals

FOR THE

TWELFTH SUPREME JUDICIAL DISTRICT

No. 839

CITY OF FARMERS BRANCH, TEXAS,

Appellants,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,

Appellees.

Appeal from the 134th Judicial District Court

July 31, 1975

Plaintiff-appellee, American Honda Motor Company, Inc. (American Honda) brought suit against appellants City of Farmers Branch, Texas, and T. E. Waldrip, the Tax Assessor-Collector of Farmers Branch, seeking a declaratory judgment that certain inventory on hand at American Honda's Farmers Branch warehouse on January 1, 1972, is exempt from taxation by virtue of the provisions of Article 1, Section 10, Clause 2

(the Import-Export Clause), of the United States Constitution.[1] Further, American Honda sought a permanent injunction, enjoining Farmers Branch and Waldrip from attempting to impose, collect or enforce any taxes upon or with respect to the disputed inventory for the year of 1972. In a non-jury trial, the court held that imported merchandise in American Honda's surplus storage brought to Farmers Branch directly from Japan was exempt from taxation under the Import-Export clause, but that otherwise exempt imports in "surplus storage" in American Honda's Farmers Branch warehouse brought from "surplus storage" in other warehouses of American Honda in the continental United States were not exempt. The parties filed stipulated facts, and pursuant to appellants' request, the trial court filed finding of fact and conclusions of law.

We have this day decided an appeal in City of Farmers Branch et al vs. Matsushita Electric Corporation of America, No. 838, which appeal raised some of the same questions as are presented here.

This cause of action arose by virtue of appellants' imposition of an ad valorem tax on personal property located within Farmers Branch, under the power vested in it by Article 1165 of the Texas Revised Civil Statutes.[2] On January 1, 1972, American Honda rendered for taxation personal property valued at $160,310.85 which was situated in its warehouse in Farmers Branch. American Honda also had additional property valued at $293,050.15 in its warehouse which it did not render for taxation, claiming that the property was exempt under

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[1] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws, * * *"

Article 1, Section 10, Clause 2, of the United States Constitution. It is undisputed that American Honda claimed this exemption and pursued all administrative remedies, but was denied the claimed exemption for the inventory in question.

The disputed inventory consisted of parts and accessories for motorcycles, automobiles or outboard motors which were manufactured by Honda, Ltd., in Japan and distributed domestically to American Honda's warehouses situated throughout the United States. The location of American Honda's warehouses is determined in substantial part by the geographical pattern of retail demand for appellee's units and the parts needed for repair of consumer-owned units. All goods shipped by Honda, Ltd. to appellee, including all of the disputed inventory on January 1, 1972, were subject to United States' custom duties which had been paid by custom brokers on behalf of American Honda.

In its Gardena, California, offices American Honda maintains a perpetual inventory count of all units and parts of

[2]"Cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature. No charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution or general laws of this State; said cities may levy, assess and collect such taxes as may be authorized by law, or by their charters; but no tax for any purpose shall ever be lawful for any one year which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon. No city charter shall be altered, amended or repealed oftener than every two years. The governing body of such city may, by two-thirds votes of its members, or upon petition of ten per cent of the qualified voters of said city, shall provide by ordinance for the submission of the question, 'shall a commission be chosen to frame a new charter.' "

stock in each of its warehouses in the United States by means of its data processing system. To determine the size of its inventories in each warehouse, American Honda considers various factors such as demand requirements, budgetary considerations, availability from source, anticipated monetary revaluations and other special considerations such as the possibility of future material shortages. The inventory turnover of parts at American Honda's Farmers Branch warehouses is approximately once a year or slightly more than once a year.

When parts are ordered by American Honda, employees of Honda Ltd. at its warehouse in Japan put these parts in corrugated cartons and seal them. These corrugated cartons are then placed in sea vans by Honda, Ltd.'s employees and the sea vans are transported to the steamship dock in Japan where they are loaded onto steamships for transport to the United States. Except for a few specialized instances, the cartons of parts contain a relatively large number of items per carton.

The steamship line whose vessel is to carry a specific shipment supplies a sea van at the Honda, Ltd. parts warehouse dock in Japan for use in transporting corrugated cartons of parts to the United States. A sea van is a large metal container which weighs 6,200 pounds and measures 40 feet long, eight feet high and eight and one-half feet wide. The van is at all times owned by the steamship line and is furnished by the steamship line for the purpose of carrying the cargo of sealed corrugated cartons overseas. When the sea vans have been unloaded at Farmers Branch, Gardena, and elsewhere, they are returned to the steamship line which owns them at a port of entry in the United States.

In 1971, the sea vans from Japan were brought to American

Honda's Gardena, California, warehouse where they were opened and the sealed corrugated cartons were unloaded and placed in enclosed semi-trailer trucks for shipment to American Honda's Farmers Branch warehouse or they were stocked in "surplus inventory" at American Honda's Gardena warehouse and, at a later time, forwarded to the Farmers Branch warehouse for "surplus storage" there.

There are two segregated areas for storing the inventory at American Honda's Farmers Branch warehouse. The area for the storage of the sealed unopened corrugated cartons is designated "surplus storage" and is segregated from other parts of the warehouse. When the sealed unopened corrugated cartons arrive at American Honda's Farmers Branch warehouse, employees unload these cartons at a receiving area and they are taken to the "surplus storage" area until they are needed in the "open stock" area.

The "open stock" area is the other area for storing inventory at Farmers Branch. It is segregated from the "surplus storage" area and consists of storage bins of parts which are no longer in cartons and are for current use in filling orders. When an open stock bin becomes low on parts, it is refilled by removing a carton from "surplus storage," opening the carton and distributing its contents into the depleted open stock bin. Sometimes, sealed and unopened cartons which normally would be stored in the "surplus storage" area are kept on top of the racks containing bins of open stock in the "open stock" area although the cartons remain sealed and unopened. This area is referred to as "above-bin surplus storage." These cartons, though sealed and unopened, are not included in the inventory-count of "surplus storage" and are not included in the count of disputed inventory.

Transfers of stock from the American Honda Farmers Branch warehouse to other American Honda warehouses in the United States are made from both "open stock" and from the stock of sealed and unopened corrugated cartons in "surplus storage" and "above-bin surplus storage" while transfers of stock from Gardena, California, to the Farmers Branch warehouse are out of stock of sealed corrugated cartons in "surplus storage" and not from "open stock."

The main function of appellee's warehouses, including its warehouse in Farmers Branch, is to store merchandise which is necessary to supply to retail dealers carrying "Honda" brand merchandise in the southwest region. No manufacturing, repair work, or servicing is carried on at the American Honda warehouse in Farmers Branch. All disputed inventory on hand at the American Honda warehouse in Farmers Branch on January 1, 1972, was the property of American Honda, unsold, segregated in the "surplus storage area" of the warehouse, and in the original unopened corrugated cartons in which it was packed in Japan.

In their first point, appellants maintain the trial court erred in finding that the disputed inventory in the Farmers Branch warehouse of American Honda on January 1, 1972, had not been incorporated into the mass of goods in the United States and, therefore, was still "imports" for the purposes of Article 1, Section 10, Clause 2, of the United States Constitution. Appellants rely primarily on Youngstown Sheet and Tube Company v. Bowers, 358 U.S. 534, 541-42 (1959), 79 S.Ct. 383, and argue that (1) the disputed inventory has lost its character as imports; (2) the disputed inventory has been fully committed to the appellee's operational needs and, therefore, should not be tax exempt; and (3) the act of importation

which is protected by Article 1, Section 10, Clause 2, may end, and in this particular case, has ended, before the goods are removed from the original package. We disagree.

In Brown v. State of Maryland, 25 U.S. (12 Wheat.) 419, 6 L.Ed., 678, 686 (1827), the Supreme Court interpreted the Import-Export clause and espoused what has become known as the "original package" doctrine. The court speaking through Chief Justice Marshall stated that " * * * (w)hen the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state, but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

The United States Supreme Court has continued to apply the original package doctrine in: Low v. Austin, 80 U. S. (13 Wall.) 29 (1872); Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), 65 S.Ct. 870; and Dep't. of Revenue v. Beam Distilling Co., 377 U. S. 341 (1964), 84 S.Ct. 1247. Some of the more recent state and federal court decisions which apply the "original package" doctrine to imported goods held for sale are: Wages v. Michelin Tire Corporation, 214 S.E.2d 349 (Georgia Sup. Ct., 1975, cert. granted); Wilson v. County of Wake, 199 S.E.2d 665, 668 (N. C. Ct. App., 1973); Price Paper Corporation v. Detroit, 42 Mich. App. 488, 202 N.W.2d 523, 525 (Ct. App., 1972); Sterling Liquor Distributors, Inc. v. County of Orange, 3 Cal. App. 2d 510, 83 Cal. Rptr. 571, (Ct. App., 1970), cert. denied, 400 U.S. 822 (1970); Tricon, Inc. v. King County, 60 Wash 2d 392, 374 P.2d 174 (1962),

cert. denied, 372 U.S. 908 (1963); Standard-Triumph Motor Company v. City of Houston, Texas, 220 F.Supp. 732, 734 (S.D. Tex. 1963), vacated on other grounds, 347 F.2d 194 (5th Circ. 1965), cert. denied 382 U.S. 974, 86 S.Ct. 539 (1966); State ex rel H. A. Morton Company v. Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 N.W.2d 914 (1962); Miehle Printing Press and Manufacturing Company v. Department of Revenue, 18 Ill. 2d 445, 164 N.E.2d 1, (Ill. 1960).

In the case at bar, the disputed inventory remained as the property of American Honda, the importer, in a segregated part of American Honda's Farmers Branch warehouse, in the original corrugated cartons in which it was imported. Therefore, applying the "original package" doctrine, we believe that a tax upon the disputed inventory was subject to the prohibition set forth in the Import-Export clause of the Constitution.

In Youngstown Sheet and Tube Company v. Bowers, supra, the Supreme Court, relying upon Brown v. State of Maryland, supra, reemphasized some of the acts or conduct of the importer that would deem the importer to have "so acted upon the thing imported" as to cause it to be "mixed up with the mass of property in the country (and to lose) its distinctive character as an import." The court stated that goods lose their character as imports when the importer (1) "sells them," (2) "(breaks) up his packages," and (travels) with them as an itinerant pedlar, or (3) when goods are brought into this country by an importer "for his own use" and are here "used" by him. Also, see Brown v. State of Maryland, supra.

In the case at bar, the disputed inventory owned by American Honda has not been (1) sold (2) it had not been broken

out of the corrugated cartons in which it was imported, nor was it (3) brought into this country for Honda's own use or consumption. It was simply stored in its original packages in a segregated place until it was needed to supply the demand of the American market.

Appellants attempt to rationalize by analogy the facts involved in the case at bar with the rationale of the court in *Youngstown* in which the court stated that the iron ore, lumber, and veneers had been irrevocably committed to use in manufacturing at the plants to which they were shipped and that the iron ore, lumber and veneers were necessarily required to be kept on hand to meet current operational needs and were actually being used to supply those needs. To show that imported goods which are held for sale should be treated similarly to imported goods held for use in manufacturing, appellants cite a quote from Hooven & Allison Co. v. Evatt, supra, which is discussed in the following quotation from Youngstown Sheet and Tube Company v. Bowers, supra, p. 542: "In Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252, it was held that goods imported for 'use' share the same immunity as goods imported for 'sale,' and that goods imported 'for manufacture (do not) lose their character as imports any sooner or more readily than imports for sale' * * * ; but 'when (the imported goods are) used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.' "

Nevertheless, we believe that the facts involved in the case at bar are distinguishable from *Youngstown* for at least three reasons. First, notwithstanding the previously mentioned quote from *Youngstown*, we have not been cited nor have we been able to find any factually similar cases which hold that goods

which were imported for sale and stored in their original containers (as opposed to goods imported for use in manufacturing) were irrevocably committed to the purpose for which they were imported and were necessarily required to be kept on hand to meet current operational needs and were actually being used to supply those needs. In this regard, we quote from Tricon, Inc. v. King Country, supra, p. 176, where certiorari was denied: "We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale."

Second, there is no finding as to what portion, if any, of the disputed inventory was necessarily required to meet current operational needs. Certainly, the most current operational needs were filled from inventory taken from the "open stock" bins.

Third, the disputed inventory is not necessarily at its final destination when it reaches American Honda's warehouse in Farmers Branch. The stipulated facts, as well as the trial court's findings of facts, reveal that sometimes transfers of stock from the American Honda Farmers Branch warehouse were made to other American Honda warehouses in the United States even though the transfers are made from both "open stock" and from the stock of sealed corrugated cartons in "surplus storage." Appellants' first point is overruled.

In their second point, appellants maintain the trial court erred in finding that the general property tax imposed on the disputed inventory is an "impost" or "duty" contrary to the import clause of the United States Constitution. Appellants argue that *Youngstown* established that a non-discriminatory property tax does not violate the Import-Export clause, and

that the language of the Import-Export clause indicates that a general property tax was not within its intended prohibition. We disagree.

The Supreme Court of the United States has rejected appellants' argument in Low v. Austin, supra, by holding that while goods retain their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The court stated that: "The question is not as to the extent of the tax or its equality with respect to taxes on other property, but as to the power of the state to levy any tax." If, in fact, any discrimination against domestic and in favor of foreign producers of goods does result because of the tax immunity of imports, such discrimination is implicit in the constitutional provision and in its purpose to protect imports from state taxation. Hooven & Allison Co. v. Evatt, supra. Moreover, the disputed inventory was subject to substantial custom duties while domestic goods are not.

The rationale of *Low* and *Hooven* that all taxes, even non-discriminatory ad valorem taxes, are unconstitutional if imposed upon merchandise which retains its status as imports has been reaffirmed in Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 76, 67 S.Ct. 156 (1946), and Department of Revenue v. James Beam Distilling Company, supra, p. 343.

Appellant also argues that the rationale employed in interstate commerce cases should be applied to the disputed inventory so that a non-discriminatory tax will not violate the Import-Export clause.

The Import-Export clause and the Commerce clause, while related, are not coterminous. There are two important differences between the two clauses. First, the Import-Export clause prohibits taxation by the states on the import or export, while the

application of the Commerce clause has no relationship to whether an article was or ever has been, an import or export. Second, the Commerce clause is not cast in terms of a prohibition against taxes but in terms of power of the Congress to regulate commerce. The Import-Export clause does not prohibit every state from laying "any discriminatory" tax on imports or exports, but rather prohibits the state from laying "any tax" except what may be absolutely necessary for executing its inspection laws." Richfield Oil Corp. v. State Board of Equalization, 67 S.Ct., pp. 159-160. Consequently, we certainly cannot write any qualifications into the Import-Export clause. Appellants' second point is overruled.

In their third point, appellants maintain the trial court erred in finding that the goods stored in the Farmers Branch warehouse of American Honda had not been removed from the containers in which they had been transported into this country and, therefore, were not subject to local taxation under the "original package" doctrine.

The facts reveal that the sea van is furnished by the steamship line for the purpose of carrying the sealed corrugated cartons overseas and that when the sea vans are unloaded at Farmers Branch, Gardena, or elsewhere, they are returned to the steamship line. The mere use of new technology in shipping should not destroy the tax immunity of the property shipped. Michigan State Tax Commission v. Garment Corporation, 32 Mich.App. 715, 189 N.W.2d 72, 74 (Mich.Civ.App.), cert. denied 404 U.S. 992 (1971); Wages v. Michelin Tire Corporation, 214 S.E.2d 349, 355 (Georgia Sup. Ct., 1975), cert. granted. Therefore, we do not believe that the opening of the sea vans constitutes the breaking of the original packages.

Appellants rely primarily on Volkswagen Pacific, Inc. v.

City of Los Angeles, 496 P.2d 1237 (Calif. 1972). However, in *Volkswagen Pacific, Inc.*, the court recognized that "* * * it would not necessarily follow, as a matter of law, that merely because an importing agent removed the parts from the vans, they then lost the constitutional protection of imported articles." Also, the court recognized that "* * * the opening of such a container by an importer may not necessarily be effected 'for the sale or delivery of the separate parcels contained in it' * * * but may instead be accomplished so that the importer can by other means of transportation divert his imports to his outlets in different interior states." The facts in the instant case fit squarely within the exception recognized by the court in *Volkswagen Pacific, Inc.* The sea vans containing the disputed inventory were brought to American Honda's warehouse in Gardena where the seal on the sea van would be broken and the sealed corrugated cartons would be unloaded into enclosed semi-trailer trucks and shipped to Farmers Branch. There was no breaking of the original package. Appellants' third point is overruled.

By way of a crosspoint of error, appellee attacks the judgment and maintains that the trial court erred in finding that a part of the disputed inventory received in sea vans from Japan in Gardena, California, stocked in "surplus inventory" at the Gardena warehouse of American Honda, and later shipped to American Honda's "surplus inventory" in Farmers Branch is not exempt from taxation under the provisions of Article 1, Section 10, Clause 2, of the United States Constitution. We sustain this contention.

We are unable to distinguish between the situation in which the disputed inventory is shipped directly from the Gardena port of entry upon its arrival from Japan, and the situation in

which the disputed inventory is temporarily stored in the "surplus storage" area of the Gardena warehouse before it is shipped to Farmers Branch. In both situations, the disputed inventory was segregated and stored in the "surplus storage" area in its original packages. The Import-Export clause was intended to immunize imports from taxation by the importing states, and all other states through or into which they may pass, so long as they retain their distinctive character as imports. Youngstown Sheet and Tube Company v. Bowers, supra, p. 545. The immunity attaches "where the imported merchandise is stored in the original package at the importers warehouse at the port of entry or in an interior state." Hooven & Allison Co. v. Evatt, supra, p. 664. Wilson v. County of Wake, supra.

We believe, therefore, that the trial court erred in holding that the disputed inventory, which was temporarily stored in the "surplus storage" area of the Gardena warehouse before it was shipped to the Farmers Branch warehouse was subject to taxation by Farmers Branch. This portion of the judgment is reversed and judgment rendered for appellee. In all other respects, the trial court's judgment is affirmed.

Since we have affirmed the judgment in part and reversed in part, we tax the costs on appeal and in the court below equally against appellants and appellee. Coca Cola Bottling Company of Houston v. Hobart, 423 S.W.2d 118, 126 (Tex.Civ.App., Houston, 14th Dist., 1967, writ ref., n.r.e.); Combined American Insurance Company v. The City of Hillsboro, 421 S.W.2d 488, 491 (Tex.Civ.App., Waco, 1967, writ ref., n.r.e.); Wichita National Bank v. United States Fidelity & Guaranty Co., 147 S.W.2d 295, 298 (Tex.Civ.App., Fort Worth, 1941, n.w.h.); Rule 448, T.R.C.P.

Affirmed in part and reversed and rendered in part.

/s/ OTIS T. DUNAGAN
Chief Justice

Opinion delivered July 31, 1975.

5. Respondent American Honda's Reply to Petitioners' Application for Rehearing Before the Texas Supreme Court (filed jointly with Respondent Matsushita Electric Corp. in No. B-5551).

In the

Texas Supreme Court

No. B-5550

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent.

Appeal from the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District

REPLY TO PETITIONERS' APPLICATION FOR REHEARING

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TO THE SUPREME COURT OF TEXAS:

Respondents in the above causes respectfully submit this reply to the "Petitioner's Application for Rehearing of Its Application for Writ of Error." The nature of each case and its result are correctly stated in the opinions below and in the respective Replies to Application for Writ of Error previously filed by respondents Matsushita and Honda.

The Application for Rehearing is based upon the January 14, 1976 decision of the United States Supreme Court in *Michelin Tire Corp. v. Wages*, ____ U.S.____, 44 U.S.L.W. 4070 (Jan. 14, 1976).

Michelin overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871), and over 100 years of unbroken federal and state authorities following that case (see Matsushita Reply to Application, pp. 38-42) — and held that the assessment of a nondiscriminatory ad valorem property tax upon imported personal property *is not* prohibited by the "Import-Export Clause" of the United States Constitution (Article I, Section 10, Clause 2) even if those imports are stored in their original packages in the importer's warehouse.[1]

Nevertheless, despite the *Michelin* decision, the Application for Rehearing should be overruled. The decision in *Michelin Tire Corp. v. Wages, supra*, should not be applied retroactively to the Matsushita and Honda cases before this Court.

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[1]The *Michelin* case concerns only this issue, which was raised by Petitioners as their Point of Error Number Two in both of the present cases (see, e.g., Matsushita's Reply to Application, pp. 38-42). It has no effect whatever upon any of the other Points of Error — upon which this Court correctly denied Petitioners' Application for Writ of Error (see Matsushita's Reply to Application, pp. 10-37, 43-81).

The Supreme Court did not decide if the *Michelin* decision would operate prospectively or if it would be given retroactive effect. This issue, respondents understand, will be presented to the Supreme Court in the motion for rehearing to be filed in *Michelin*.[2] When this issue of retroactivity is considered by the Supreme Court— or by a lower federal court or a state court[3] — the principles to be applied are established. They are stated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v United Shoe Machinery Corp., supra, at 496, 20 L Ed 2d at 1243, ... *Second*, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v Walker, supra, at 629, 14 L Ed 2d at 608. *Finally*, we have weighted the inequity imposed by retroactive appli-

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[2]This motion for rehearing is due on February 8, 1976 (Sup. Ct. Rule 58). The counsel for Michelin Tire Corporation has advised the undersigned attorneys that this motion for rehearing will be limited to the issue of retroactivity.

[3]It is clear that federal or state courts have the power to decide the issue of retroactive application of a Supreme Court decision in a subsequent case if the Supreme Court has not addressed the question. See *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972) [denying retroactive effect to *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969)]; *Bush v. Wood Bros. Transfer, Inc.*, 398 F.Supp. 1030 (S.D. Tex. 1975) [denying retroactive effect to *Johnson v. Railway Express Agency, Inc.*, ____ U.S. ____, 44 L.Ed2d 295 (1975)]; and *Deary v. State*, 510 S.W.2d 956 (Tex. Crim. App. 1974) [denying retroactive application of *United States v. Wade*, 388 U.S. 218 (1967)].

> cation, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' Cipriano v City of Houma, supra, at 706, 23 L Ed 2d at 652." (404 U.S. at 106-07) (emphasis added).

These same basic principles have been applied in many other cases. *See generally* 1B Moore, Federal Practice § 0.402 [3.-2] (1965 Ed. and 1974 Supp.). See also *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1970); *Whittenburg v. Whittington*, 523 S.W.2d 441 (Tex. Civ. App. — Houston 1975); *Williams v. Estelle*, 500 F.2d 206, 210 (5th Cir. 1974); and *Bourns, Inc. v. Allen-Bradley Co.*, 480 F.2d 123, 130 (7th Cir. 1973).

Under this three-point test, it is obvious that the *Michelin* decision should not be applied retroactively. First, Michelin certainly establishes a new principle of law "by overruling clear past precedent on which litigants may have relied" for over 100 years following *Low v. Austin*. Second, the purpose of the *Michelin* decision — the "prohibition of nondiscriminatory ad valorem property taxes" by the *Low v. Austin* interpretation of the Import-Export Clause — would not be furthered by retroactive application, nor would it be retarded by applying the decision only prospectively.

Finally, giving retroactive effect to *Michelin* would produce substantial inequities: The imported goods have been sold and if taxing authorities are now permitted to tax these goods under *Michelin* — despite the reliance by Matsushita, Honda and other importers on the long-standing principles of *Low v. Austin* — there would be no way for these increased costs to be recovered by the importers. The taxing authorities would reap a windfall. The consumers who purchased the imported goods would not share any part of the increased cost. This would be contrary

to the *Michelin* opinion itself, which makes it clear that the Supreme Court expected that the burden of nondiscriminatory ad valorem taxation of imports should fall on the ultimate consumers, just as such nondiscriminatory taxation falls upon consumers who purchase domestic goods:

> ". . . To be sure, allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by 'inland' consumers. But as already noted, such taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. . . ." *Michelin Tire Corp. v. Wages*, ____ U.S. ____, 44 U.S.L.W. 4073-74 (Jan. 13, 1976) (footnote omitted).

A significant change in the law — such as the overruling of over 100 years of authority by *Michelin* — should not be applied retroactively in any case involving ad valorem taxation. To do so if the change *subjects property to taxation* would be inequitable and cause unjust hardship by subjecting taxpayers to retroactive assessments and often sizable or crippling penalties and interest. To do so if the change *exempts property from taxation* would permit taxpayers to obtain refunds for past years and perhaps threaten the financial solvency of taxing authorities.

Therefore, in cases involving ad valorem taxation, it has been held that decisions like *Michelin* will not be given retroactive effect. For example, *Oklahoma County v. Queen City Lodge No. 197, I.O.O.F.*, 195 Okla. 131, 156 P.2d 340 (1945), held that a decision which significantly reversed the law in an ad valorem tax case would be effective only for those properties

first assessed and taxed in the year following the decision:

> "The pronouncement of this rule and the overruling of the three decisions above referred to constitutes a definite change in the construction of an important provision of our Constitution. The result is that under this decision property will be taxable which under the former construction was not taxable. We are aware that such change in construction of our constitutional provision would visit great hardship in many instances unless protection is given property owners as against taxes for back years which might naturally be thought now to have accrued during the past thirty-seven years since statehood.
>
> "Though property owners are likely not possessed of vested property or contract rights in tax exemptions as allowed by our Constitution *it is of course obvious that many property owners have omitted to pay taxes for many years in reliance upon our former opinions.* To require payment now with the heavy interest and penalties attached would work extraordinary hardship in a great number of cases, and in many cases would result in financial ruin.
>
> "Such resulting hardship constitutes one of the most powerful reasons for the general rule, and the inclination of the courts, to abide by former decisions though wrong." (156 P.2d at 354) (emphasis added).

Accord: Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770, 778 (1963) (holding that a decision exempting property from taxation, and overruling long-established law to the contrary, would be applied only prospectively because the taxing authorities had "long predicated their fiscal affairs" upon the prior law and because the taxpayer refunds which would be sought if the decision were applied retroactively "threatens the financial solvency of many taxing units of the state. . . ."); *Board of Equalization v. Tulsa Pythian Benev. Ass'n of Tulsa*, 195 Okla. 458, 158 P.2d 904 (1945); *German Gymnastic Ass'n of Louisville v. City of Louisville*, 306 Ky.

810, 209 S.W.2d 75, 76 (1948); *Button v. Drake*, 302 Ky. 577, 195 S.W.2d 66, 70 (1946).

The decision in *Michelin Tire Corp. v. Wages* should not be given retroactive effect. It should be applied prospectively only to those ad valorem taxes which are first assessable after the date of the final decision in *Michelin*. It should have no application to the Matsushita and Honda cases before this Court.

Therefore, "Petitioner's Application for Rehearing of its Application for Writ of Error" should be overruled. In the alternative, this Court should reserve decision on the issue of retroactivity until the Supreme Court has acted upon the motion for rehearing in *Michelin Tire Corp. v. Wages*.

Respectfully submitted,

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of America

CERTIFICATE OF SERVICE

Copies of this Reply to Petitioner's Application for Rehearing were, on this 2nd day of February, 1976, served by mail upon Ronald M. Mankoff, Durant, Mankoff, Davis & Wolens, 3900 First National Bank Bldg., Dallas, Texas 75202, attorneys for petitioners, the City of Farmers Branch, Texas and T. E. Waldrip.

JERRY L. BUCHMEYER

6. Respondent American Honda's Reply to Petitioners' Brief on Rehearing Before the Texas Supreme Court (filed jointly with Respondent Matsushita Electric Corp. in No. B-5551).

In the

Texas Supreme Court

No. B-5550

CITY OF FARMERS BRANCH, TEXAS and T. E. WALDRIP,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent.

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TO THE SUPREME COURT OF TEXAS:

Pursuant to leave granted at the argument on March 10, 1976, this memorandum is submitted in opposition to the brief of petitioners received by respondents the day before the hearing. The nature of each case and its results are correctly stated in the opinions below and in the respective Replies to Application for Writ of Error previously filed by respondents.

The correctness of the *Michelin* decision is not challenged here. For purposes of the present question before this court the applicability generally of the Farmers Branch tax to each respondent for the tax year in question is not in issue. The sole question for decision by this court is whether the rule of the *Michelin* case should be applied only prospectively, in which case the judgments below should be affirmed as to the tax year in question but modified so as to provide that the rule of the *Michelin* case be applied only to the ad valorem taxes which are

first assessable after the date of the Supreme Court's *Michelin* decision.*

Emphasis is ours throughout.

THE MICHELIN DECISION SHOULD BE ACCORDED PROSPECTIVE APPLICATION ONLY

At the outset, it should be recognized that the *Michelin* decision does not itself create or command any substantive right of any party to this case. That decision merely removed a long-standing constitutional prohibition against taxes of the kind involved here. The question now before this court only involves the judicial policy of the United States and of this state as to whether to permit only prospective application of the decision. Insofar as such state policy is concerned, retroactive application of the *Michelin* case is neither constitutionally required nor prohibited, and it is this court's prerogative and its responsibility to declare that state policy. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 958 (1949) [opinion denying rehearing]; *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Respondents ask this court to apply the rule of nonretroactivity as a matter of state and federal law.

In cases where the question here has been before the United States Supreme Court, there has developed a modern doctrine of "nonretroactivity", leading finally to a recent tendency of the Supreme Court to deny retroactive effect of many major

*Contrary to the contention of Farmers Branch the Supreme Court did not decide the question of retroactivity in its denial of rehearing in the *Michelin* case. See the Michelin petition for rehearing at page 2 ("Question *to be Presented* on Rehearing") where Michelin asks "*to brief and argue* whether such overruling should be given retroactive or prospective effect," and Michelin's prayer for relief at page 10. A determination of the Supreme court not to review a question imports no expression of opinion on the merits. *United States v. Carver*, 260 U.S. 482, 490 (1923).

constitutional decisions. See *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973); 1B *Moore, Federal Practice*, §0.402 [3.2-5] (Supp. 1975). Recognizing that nonretroactive relief is frequently accorded by both state and federal courts in civil litigation, the Supreme Court in *Lemon v. Kurtzman*, suggested the considerations which led to the adoption of such a policy (411 U.S. at 199):

> [S]tatutory or even judge-made rules of law are hard facts upon which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.

The courts have developed well-defined principles for determining whether a decision should be denied retroactive effect. These were most articulately stated by the Supreme Court in a civil case, *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as follows (404 U.S. at 106-107):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied,* or by deciding an issue of first impression whose resolution was not clearly foreshadowed.* *Second*, it has been stressed that " 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"* *Finally*, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."*

*Citations omitted.

In its oral argument and its brief Farmers Branch has studiously ignored the principles discussed in *Chevron* and the other Supreme Court cases which concern the "doctrine of nonretroactivity" (411 U.S. at 199). The Amicus brief does likewise. Respondents' claim of retroactivity, on the other hand, is founded directly on the modern decisions of the United States Supreme Court and state supreme courts which address the very question of nonretroactivity in terms of judicial policy. Applying the principles of those cases to the present case it is clear that the *Michelin* decision should not be applied retroactively.

(i) The *Michelin* case established a new principle of law "by overruling clear past precedent on which litigants may have relied"

Low v. Austin held in 1871 that the Import-Export Clause prohibited ad valorem taxes on personal property under the circumstances of these cases. Challenges to this holding were swept aside again and again by the Supreme Court over the 105 years until *Michelin* decided in 1976 to abolish its rule.* On the authority of *Low v. Austin* respondents commenced this suit and were granted an injunction by the trial court, and the Court of Civil Appeals affirmed in a strong opinion grounded on the very holding of that case. Both in a broad historical sense of stare decisis, and in the microcosm of the present cases as well, the conclusion is obvious: *Low v. Austin* was the settled law for more than a century until the *Michelin* case overruled it without briefing or argument.

Manifestly respondents, like so many other importers of merchandise from abroad, right up to the time of the *Michelin*

*See, e.g., *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

decision relied on the rule of *Low v. Austin* which had remained for so long an established rule of constitutional law. Farmers Branch argues that respondents were not entitled to rely on *Low v. Austin* because Farmers Branch was insisting on imposing the tax, as though "reliance" was based on some kind of individual estoppel as between the importers and the taxing authority. But that is not the nature of the reliance which is involved here: here the question is whether the parties *and others similarly situated* had in carrying on their business a reasonable, intelligent belief in the viability of the rule that had remained a part of the established fabric of constitutional law for a hundred years. That reliance on which respondents depended in locating and establishing their warehouses, pricing their goods, maintaining their inventories seasonally, and making other business decisions, has nothing to do with classic concepts of individual estoppel. The question of reliance here turns on the relationship of the individual to the body of established law in society, not the relationship between him and the taxing authority.

To say that respondents' reliance on *Low v. Austin* could be defeated by the unilateral contention of Farmers Branch that it was entitled to tax respondents in violation of a century-old precedent would be to deny the very benefit of precedent in the reality of modern commercial society. As stated by Justice Cardozo, "[a]dherence to precedent must . . . be the rule rather than the execption if litigants are to have faith in the even-handed administration of justice in the courts." Cardozo, *The Nature of the Judicial Process*, 34 (1921). This very same issue was posed to the Supreme Court in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) where the argument was raised that the private schools in question were "foolhardy" to rely upon the

statutory reimbursement plan in view of the "constitutional cloud" over the program from the very outset. The Court rejected this argument and refused retroactive application of its holding even though the reimbursement scheme was constitutionally suspect from its inception. 411 U.S. at 206, 207. The threat and existence of litigation was not enough to defeat the school's reliance on the reimbursement plan.

The first *Chevron* test is clearly met in the present cases.

(ii) The purpose of the *Michelin* decision can be effected without retroactive application to the present case

The Court in *Michelin* held that the "prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause . . . ." Opinion, p. 16. Such objectives were the regulation of foreign commerce, preventing discrimination on imports because of their place of origin, and the raising of revenue. The imposition of a nondiscriminatory ad valorem tax had no effect on these objectives and therefore, the Court said, *Low v. Austin* which prohibited such a tax was wrongfully decided.

As expressed by the Court, an important reason why imported goods should not be exempt from local non-discriminatory ad valorem taxes was that they benefited from local services provided by governmental agencies normally funded by the ad valorem tax. The Court held that imported goods should bear their fair share of such local services and thereby be put on an equal basis with domestic competition. Although ad valorem taxation may have the effect of an increase in the cost of consumer goods, the Court stated (Opinion, p. 12):

There is no reason why local taxpayers should subsidize

> the services used by the importer; *ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with these goods.*

Thus, a primary purpose of the change in law is to allow local government agencies to impose ad valorem taxes and to thereby require ultimate consumers to pay for the benefits and services accorded the goods.

The "purpose" of *Michelin* would neither be furthered by retroactive application, nor would it be retarded by applying the decision prospectively. For the years in which *Low v. Austin* was the controlling decision, business decisions were made in reliance upon the ban against ad valorem taxes on imported goods retaining their character as imports. Local municipalities based projections of tax revenues partly on their inability to tax imported goods, for ad valorem taxes on imported goods which retained their character as imports *had never been upheld*. To reach back and disturb past legal relationships would not further the *Michelin* purpose and would result in what amounts to a penalty for those who justifiably relied on *Low v. Austin*, while the taxing authorities would reap a windfall in added revenues without a concomitant increase in the expenses of local services nor a proper allocation of such burdens to the ultimate consumer.

The actual existence of the law prior to the determination of unconstitutionality "is an operative fact and may have consequences which cannot be justly ignored. The past cannot always be erased by a new judicial declaration.' " *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940). The Court in *Michelin* overruled what heretofore *has been the law*, — law upon which the whole community, taxpayers and the city

alike, have acted; and at this point in time it is impossible to further the purpose of the new rule by retrospective application.

In *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) this court overruled prior decisions which prohibited a child from suing its parent when the child was working for a parent. This court recognized that tortfeasors and insurors alike could have relied upon prior decisions to the contrary and therefore refused full retroactive effect of the decision. In *Whittenburg v. Whittington*, 523 S.W.2d 441 (Tex. Civ. App. — Houston [14th Dist.] 1975, writ ref'd n.r.e.) the court refused to apply its prior decision holding a garnishment procedure unconstitutional to a writ which was obtained in good faith prior to the decision. In both of these, the purposes of the new rules were not served by applying the rules retroactively.*

Such is the case here. Allowing retroactive application of *Michelin* would not further the purpose of *Michelin*, to allow imported goods to reflect the true costs of services and benefits conferred by local governments. That result can *only* be achieved by changed business practices in tax years following the change decreed in the *Michelin* case. And this is necessarily true with respect to all taxpayers — those with cases pending in the courts,** those who claims of exemption have been denied but who are not in the courts, and those against whom the tax authority may now direct collection efforts for past years.

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*See also, *Swank v. Tyndall*, 226 Ind. 204, 78 N.E.2d 535, 542-543 (1948) (court refused to apply a decision retroactively to allow recovery of excessive salaries of officials elected pursuant to an unconstitutional amendment). In *accord*, *Washington State Finance Comm'n v. Martin*, 384 P.2d 833 (Wash. 1963) (unconstitutionally issued limited obligation revenue bonds); *State ex rel Ward v. Anderson*, 491 P.2d 868 (Mont. 1971) (unconstitutionally issued limited obligation revenue bonds); *Fisher v. Sears Roebuck & Co.*, 214 N.W.2d 85 (S.D. 1974) (usury).

**See *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

Under the second factor by which *Chevron* tests the time of application of a new rule, this Court should hold *Michelin* to be nonretroactive in its application.

(iii) Allowing retroactive effect to *Michelin* would produce substantial inequities

Michelin held that local taxpayers should not be forced to subsidize the services used by the importer. The "cost" of such services should be internalized in the final price of goods just as much as transportation costs are internalized in that price. Opinion, pp. 11-12. The imported goods of American Honda and Matsushita in issue here have been sold to the ultimate consumer, with the price of those goods reflecting their cost, including taxes, as they then existed under the long established rule of *Low v. Austin*. If petitioner is now permitted to tax these goods, there would be no way for these increased costs to be recovered by respondents. Petitioner's apparent response ignores the realities of the competitive market, implying that respondents would merely have to reduce profit expectations rather than passing any incremental cost on to the consumer. However, petitioner has oversimplified the realities of modern business practices and consumer buying habits. Price is only one of many factors which dictate whether imported goods are "competitive" with domestic goods in a given market, and hence influence the choice of the ultimate consumer. Petitioner is asking, in effect, that respondents should not even have the opportunity to make this basic business decision because it apparently only involves "profits."

Petitioner's own argument illustrates the inequitable results of a retroactive application of *Michelin*. Respondents would have to absorb all reassessments of back taxes within the applicable period of limitations, without any means to pass those increased costs on to those who benefited most from the sale of the imported goods — the ultimate consumer. Such a result has all the earmarks of a penalty, assessed merely because respondents relied upon Supreme Court precedent which was valid for one hundred and five years.

The use of prospective overruling is particularly appropriate in the field of ad valorem taxation. Allowing retroactive effect to decisions changing the character and existence of exemptions produces inequitable results by subjecting both taxpayers and local governments to extraordinary one-time charges, whether for reassessments for taxpayers, or to allow taxpayers to obtain refunds from local taxing authorities who may have "wrongfully" denied exemptions. Both results, whether in favor of the local taxing authority *or* the taxpayer, could impose serious and unfair hardships on the entity which happened to "lose" because of an intervening change in the law.

Therefore in cases involving significant changes in the law of ad valorem taxation, it has been held that a decision such as *Michelin* would be denied retroactive effect.

In *Oklahoma County v. Queen City Lodge No. 197, I.O.O.F.*, 195 Okla. 131, 156 P.2d 340 (1945) the Oklahoma Supreme Court held that a decision which significantly reversed the law in an ad valorem tax case would be effective only for those properties first assessed and taxed in the year following the decision (156 P.2d at 354):

> The pronouncement of this rule and the overruling of the three decisions above referred to constitute a definite change in the construction of an important provision of our Constitution. The result is that under this decision property will be taxable which under the former construction was not taxable. We are aware that such change in

> construction of our constitutional provision would visit great hardship in many instances unless protection is given property owners as against taxes for back years which might naturally be thought now to have accrued during the past thirty-seven years since statehood.
>
> Though property owners are likely not possessed of vested property or contract rights in tax exemptions as allowed by our Constitution *it is of course obvious that many property owners have omitted to pay taxes for many years in reliance upon our former opinions.* To require payment now with the heavy interest and penalties attached would work extraordinary hardship in a great number of cases, and in many cases would result in financial ruin.
>
> Such resulting hardship constitutes one of the most powerful reasons for the general rule, and the inclination of the courts. to abide by former decisions though wrong.

Other state court decisions are in accord with the decision in the *Queen City Lodge* case.*

In *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395, 377 P.2d 770 (1963) the Arizona Supreme Court treated the corollary of the issue discussed in *Queen City Lodge* by holding that a decision *exempting* property from taxation which overruled long standing authority to the contrary would not be retroactively applied (377 P.2d at 778):

> We take judicial notice that the taxing subdivisions of the state have long predicated their fiscal affairs upon the practice alleged in appellant's complaint . . . . The refund which appellant seeks together with other similar claims threatens the financial solvency of many taxing units of the state, particularly those in rural and undeveloped areas.

Because of the peculiar financial hardships possible by retro-

**Board of Equalization v. Tulsa Pythian Benev. Ass'n of Tulsa*, 195 Okla. 458, 158 P.2d 904 (1945); *German Gymnastic Ass'n of Louisville v. City of Louisville*, 306 Ky. 810, 209 S.W.2d 75, 76 (1948); *Button v. Drake*, 302 Ky. 577, 195 S.W.2d. 66, 70 (1946).*

actively applying a significant change in tax law, other courts have denied retroactive effect of tax decisions.*

These state cases — *Queen City Lodge, Cochise,* and the others cited in the footnotes — illustrate the kinds of hardship which have led state courts to make their tax decisions *non*-retroactive under considerations like the third factor in the *Chevron* analysis. Those cases read directly on the facts here. The common thread in all of these decisions is that allowing retroactive effect would cause substantial hardship on the parties affected. Because the overruling decision in each case changed a "clear past precedent on which litigants may have relied", and since the purpose of the overruling decision in each case could be achieved without retroactivity, the courts recognized the operative facts of the prior law and refused to apply the decisions retroactively so as to avoid the substantial hardship which would otherwise result.

The third test of the *Chevron* decision requires a like holding of nonretroactivity in the present case.

CONCLUSION

Chief Justice Burger recently observed that, "The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal.'" *Lemon v. Kurtzman*, 411 U.S. 192, 198 (1973). The salutory process by which

**City of Tempe v. Dell E. Webb*, 14 Ariz. App. 228, 482 P.2d 477, 478 (1971) (transaction privilege taxes); *Arizona Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P.2d 392, 393 (1953) (excise taxes); *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252, 259-60 (1947) (excise taxes, limited retroactive effect to parties before the court); *Welsh v. Sells*, 192 N.E.2d 753, 765 (Ind. 1963) (excise taxes); *Wiseman v. Phillips*, 84 S.W.2d 91 (Ark. 1935) (sales tax).*

those difficulties are overcome is reflected in the three tests articulated by the Supreme Court in the *Chevron* case. The facts of the present cases, analyzed in the light of those tests, overwhelmingly require that the *Michelin* decision be applied only prospectively, to those ad valorem taxes which are first assessable after the date of that decision.

Wherefore, respondents pray that the judgments below be modified so as to declare applicable in Texas after January 14, 1976, the decision in *Michelin Tire Corp. v. Wages*, and that in all other respects the judgments below be affirmed. Respondents should be awarded costs in the proceedings herein through the Court of Civil Appeals, and an appropriate order should be entered with respect to costs in this court. Rule 139, Texas Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was this day delivered to the adverse party in each of the causes to which it relates in accordance with Rule 492, Texas Rules of Civil Procedure.

Dated: March 17, 1976

By MARVIN S. SLOMAN
Marvin S. Sloman

Supreme Court, U. S.
FILED
AUG 27 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

~~76-92~~ 1

No. .....

AMERICAN HONDA MOTOR COMPANY, INC.

Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND THE TAX ASSESSOR-COLLECTOR OF THE CITY OF FARMERS BRANCH, TEXAS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

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No. .....

AMERICAN HONDA MOTOR COMPANY, INC.

Petitioner,

v.

CITY OF FARMERS BRANCH, TEXAS AND THE TAX ASSESSOR-COLLECTOR OF THE CITY OF FARMERS BRANCH, TEXAS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the CITY OF FARMERS BRANCH and T. E. WALDRIP, its Tax Assessor-Collector (hereinafter sometimes jointly referred to as "the respondent"), respectively pray that a writ of certiorari not be issued to review the judgment of the Texas Supreme Court entered in this proceeding on May 5, 1976.

RESPONDENT'S POSITION

1. This Court does not have jurisdiction under 28 U.S.C. § 1257(3) to decide the issue of the prospective or retroactive application of *Michelin Tire Corporation v. Wages*, 423 U.S. 376 (1976) 96 S. Ct. 184 (1976) in this case.

2. This is not a proper case for review of that question:

(a) The facts and circumstances of this case are identical to those in *Michelin* so that identical treatment should be accorded in each case.

(b) Whether or not the standards for prospective limitation stated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) are mandatory upon state courts, those standards would not require such limited treatment in this case.

STATEMENT OF THE CASE

The petitioner has omitted several facts from its Statement of the Case which we believe to be relevant.

The respondent had always denied the exemption claimed by the petitioner from ad valorem tax levied on its imported items stored in its Farmers Branch warehouse. January 1, 1972 was the first assessment date that the petitioner was subject to municipal taxation by the respondent. This is not a case where the respondent is attempting to assess back taxes based upon this Court's decision in *Michelin*, as intimated in the petitioner's brief. (Pet., p. 9.) There was no change in the respondent's position or policy concerning the taxability of these imported items.

The exemption claimed by Honda for each subsequent year has been disallowed and Farmers Branch has included the imported items on its tax rolls for each year. The petitioner and the respondent entered into an agreement to delay the collection of the taxes, pending the outcome in this case, if Honda kept adequate security on hand for the payment of those taxes.

Farmers Branch, from the inception of this litigation, has always raised as one of its specifically stated arguments

that *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1972) (expressly overruled by *Michelin*) was wrongly decided.[1] The taxing authority in *Michelin*, Gwinnett County, Georgia, had not argued or briefed the basis of that ultimate decision. This Court, nevertheless, held that a non-discriminatory ad valorem tax upon imports no longer in the process of importation was not an "import" or "duty" within the meaning of the Import-Export Clause.

This Court was presented with an opportunity to decide the exact issue raised by the petitioner in its petition for writ of certiorari. Michelin, in its motion for rehearing, argued that the decision should be given only prospective effect. This Court denied that motion for rehearing.

The petitioner in the case at bar has subsequently moved outside the municipal boundaries of Farmers Branch. Therefore, since this Court decided *Michelin* after January 1, 1976, the normal assessment date, if that decision is given only prospective effect, Farmers Branch will be unable to collect any taxes from the petitioner or from any other similar taxpayer which chooses to shift its location during 1976.

THE WRIT OF CERTIORARI SHOULD NOT BE ISSUED

The respondent respectively prays that a writ of certiorari not issue on any or all of the following grounds:

I. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF TEXAS CONCERNING THE RETROACTIVE APPLICATION OF THE MICHELIN DECISION.

The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3), which delimits the

[1] As stated by the Supreme Court of Texas, Honda "was plainly informed and put on notice by the City of Farmers Branch that the city considered that the goods were taxable, and that *Low v. Austin* and similar cases were wrongly decided. There is no basis for a contention that [Honda] relied on any previous action or non-action of the city because the city assessed the [Honda] property for taxes at its first opportunity." (Pet., p. A-9).

Court's certiorari jurisdiction over the judgments of state courts. Since there is no question in the present case concerning the validity of any statute, petitioner predicates jurisdiction on the clause granting certiorari jurisdiction "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of * * * the United States."[2] Petitioner cites the Import-Export Clause of the United States Constitution, Article 1, Section 10, Clause 2, under the heading "CONSTITUTIONAL PROVISION INVOLVED." Its apparent position is that jurisdiction is predicated on the existence of a constitutional question. The present case, however, does not involve a constitutional issue. The question presented by the petitioner deals solely with the concept of prospective versus retroactive application of an interpretation of the Import-Export Clause. Though that interpretation is of constitutional origin, the interpretation itself and thus any constitutional question is no longer at issue.

In the benchmark case of *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the Court held that a state court could refuse to give retroactive effect to a decision overruling a previous decision. Justice Cardozo opened the decision by stating, "we think the federal constitution has no voice upon the subject", 287 U.S. 358 at 364, and "we are not at liberty, by anything in the Constitution of the United States, to thrust upon those [state] courts a different conception either of the binding force of precedent or of the meaning of the judicial process." 287 U.S. 358 at 366.

This Court should follow the *Sunburst* reasoning in denying certiorari for a lack of a constitutional question.

[2] The language of 28 U.S.C. § 1257 (3) should be compared to the language of 28 U.S.C. § 1254 which grants power to this Court to review, by writ of certiorari, the decision of a federal court of appeals. Cases in the court of appeals "may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to *any civil or criminal case*, before or after rendition of judgment or decree . . . ." (emphasis added) The Court may review *any case and* is not limited to cases involving a right, privilege or immunity predicated on the Constitution or a federal statute.

Whether the courts of the different states allow a municipal or state tax to be assessed retroactively or only prospectively is a matter that is peculiarly within the jurisdiction of those courts. This is the type of issue that Section 1257 (3) was meant to restrict from the purview of this Court.

II. THIS IS NOT A PROPER CASE FOR REVIEW OF THESE ISSUES.

Notwithstanding petitioner's arousing argument that "this Court should pursue its supervisory function" to prevent differences from arising in various states (Pet. p. 6), we submit that it would be unfair and erroneous to initiate that pursuit in this case. Respondent has properly initiated and moved forward its legitimate legal claims for taxes duly assessed. Its position is identical to that of Gwinnett County, Georgia, and, therefore, should be treated by the courts of law in exactly the same way.

In any event, even if the issue were tested here, the standards of *Chevron* would under no circumstances require that the respondent be treated differently than Gwinnett County, Georgia was treated.

A. THIS CASE CANNOT BE DISTINGUISHED FROM MICHELIN.

The facts of the case at bar are identical to those presented in *Michelin*. In both cases, respondents assessed taxes on imported goods for 1972 and 1973. The importers sought declaratory and injunctive relief in their respective state courts. The sole difference is that Georgia, unlike Texas, has no intermediate appellate court. Consequently, the instant case was still in the state appellate courts when this Court decided *Michelin* and overruled *Low v. Austin*.

The decision in *Michelin* described the purposes which motivated the framers to add the Import-Export Clause to the Constitution. The framers wanted: (1) consistent regulation of commercial relations with foreign nations; (2) a

source of revenue for the federal government; and (3) promotion of harmony among the states. This Court decided in *Michelin* that a non-discriminatory ad valorem tax levied upon imports which have come to rest, would not contravene these specific goals.

Mr. Justice Brennan, speaking for the unanimous court, held that an importer should bear a share of the cost of police and fire protection, along with competitors handling only domestic goods. (96 S. Ct. 535, at 541.) It is undisputed that Honda has received the benefit of municipal services provided by Farmers Branch. It is also undisputed that Honda's competitors have paid their proportionate share of these costs. Michelin is liable for these taxes. Petitioner should also be liable for the taxes due and owing for the years in which it received these services.

The *Michelin* decision terminated the erroneous preferential treatment given to imports since the decision in *Low v. Austin*. Petitioner is asking this Court to extend this erroneous preferential treatment for an additional five years. Indeed, in this case, such a conclusion would entirely defeat the decision of the Texas Courts, since petitioner's warehouse is no longer located within the municipal boundaries of Farmers Branch. Therefore, its imports would never be subject to respondent's taxing authority.

The ultimate decision in *Michelin* was that the taxes imposed by Gwinnett County for 1972 and 1973 were fully collectable. This Court did not specifically reserve the question of the retroactive-prospective effect of *Michelin*, as it did in several cases cited by petitioner as authority for granting a writ of certiorari to consider the prospectivity of an earlier announced rule. *See e.g. Simpson v. Union Oil Co.*, 396 U.S. 13 (1969).

It was therefore quite necessary for the petitioner to ask this Court to "go beyond the four corners of this case" (Pet., p. 9), since the issues presented here were fully presented by the litigants in *Michelin*.

B. THE TEXAS SUPREME COURT CORRECTLY APPLIED THE STANDARDS OUTLINED IN CHEVRON.

The *Chevron* guidelines have never been considered mandatory, as argued by the petitioner,[3] but only as considerations applicable in those cases where retroactive application of a changed law or decision would work harsh and inequitable results.

But certainly this is not the case in which to test that issue, since the Supreme Court of Texas referred to these principles, and decided that *Michelin* should be applied without limitation.

Even if we liberally apply the *Chevron* general factors to our facts, it is evident that the equitable goals of that decision would not be served in this case. Those factors would support petitioner's obligation to pay its taxes for 1972 and 1973.

1. The decision must reverse "clear past precedent" on which the litigants may have relied.

Michelin overruled *Low v. Austin*, but that decision had already been tainted by this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959). This is the exact position that the respondent has taken since the inception of this suit.

Also, there is no indication that petitioner relied on prior precedent other than counsel's assertions that pricing was affected. We would assert that competition, and not costs, dictated pricing practices. If petitioner assumed that its profits would not be reduced by these taxes, it was simply mistaken.

[3] The Court itself in *Chevron* merely said that these principles *may* be looked to by courts in attempting to weigh the equities. 404 U.S. at 107. *See also Lemon v. Kurtzman*, 411 U.S. 192 (1973) [where this Court stated that the *Chevron* guidelines are helpful but are discretionary with each court]. Moreover, the Court in *Chevron* merely applied the procedural law dealing with the issue in question prospectively, but expressly held that in regard to the substantive matters in question, the overruling decision was to be applied retroactively. 404 U.S. at 108 f/n 10.

No amount of petitioner's optimism as to the outcome of its suit against respondent can be deemed to constitute "reliance." For each and every year, the petitioner has been aware of the precise amount of tax which would be due if it failed in its injunction suit against the respondent. This is not a case where the petitioner has relied upon inconsistent past actions of the respondent. This is not a case where both litigants relied on an erroneous decision.

The case at bar is clearly distinguishable from the decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), which is cited by the petitioner for the proposition that reliance is justified even though "Farmers Branch had levied an ad valorem tax before *Low* was reversed." (Pet., p. 7.) *Kurtzman* presented the question of whether repayments should be made to the state for funds expended under a state law for the benefit of non-public schools, prior to the date that such law was declared unconstitutional. This Court held that the decision declaring the state law unconstitutional should be applied only prospectively, since the parties who claimed that the statute was unconstitutional had either abandoned or not sought repayments prior to the Supreme Court's decision. In the case at bar, there is not a "reaching back" to secure relief, since the tax was assessed in the very first year in which Honda became subject to the municipal tax.

This Court held in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) that the existence of various theories on which a party may have lost vitiates his claim of "manifest injustice" when one of those theories is sustained by virtue of new law.

2. The prior history of the rule, its purpose and effect must indicate that retrospective effect would retard its operation.

The history of the Import-Export Clause indicates three reasons why it was added to the Constitution. Applying the decision in *Michelin* without limitation to the case at bar will

certainly not retard the (1) consistent regulation of commercial relations with foreign nations, (2) sources of revenue for the federal government, or (3) harmony among the states.

The primary purpose of the *Michelin* decision was not to allow "local government agencies to impose ad valorem taxes and to thereby require ultimate consumers to pay for the benefits and services accorded the goods." (Pet., p. 8.) The primary purpose of the decision was to force the importer to bear its share of the costs of municipal services and to terminate the preferential treatment afforded importers since *Low v. Austin*. (96 S. Ct. 535, at 541.) The Court in *Michelin* stated in a footnote that "depending on the relevant competition from domestic goods, an importer may be forced to absorb some of these ad valorem property assessments rather than passing them on to consumers." (96 S. Ct. 535, at 542, f/n 8.)

Petitioner argues that a retroactive application of *Michelin* would "reap a windfall in added revenues to taxing authorities without a corresponding increase, as *Michelin* intended, in the expense of local services for past years nor a proper allocation of such burdens to the ultimate consumers." (Pet., p. 8.) The petitioner's position seems to be that any taxes imposed upon importers should be paid by the consumers or not at all. This contention is neither reasonable nor logical. Perhaps, the petitioner is saying that it would have raised its prices, without regard to the competitive pricing of domestic wholesalers, if it had to pay taxes as did those domestic wholesalers. If that is the case, petitioner's ultimate complaint is that its domestic tax burden will result in a reduction of its profits. If this is, in fact, the ultimate basis of the petitioner's argument, it should be rejected.

3. Applying the new rule retroactively must produce substantial injustice or hardship in the case at bar.

Honda claims that a retroactive application of *Michelin* could cause it to "absorb all assessments of back taxes . . .

within the applicable periods of limitation." (Pet., p. 8.) The petitioner simply overlooks that its claimed tax exemption for each year was denied, and solely because of the agreement entered into between the litigants was collection delayed. Honda knew each year its potential liability and could have relied upon this potential liability "in ordering its business affairs with respect to locating warehouses, pricing goods, maintaining inventory levels, etc." (Pet., p. 7.) Farmers Branch should not be penalized if the petitioner did not make these business decisions.

Actually, inequity will result to Farmers Branch if the *Michelin* decision is limited by this Court. Farmers Branch has been in litigation for just as long as the taxing authority in *Michelin*. Farmers Branch has incurred substantial expenses in attempting to assert its constitutional right to levy a non-discriminatory ad valorem tax on imports. Farmers Branch has placed these imports on its tax rolls and budgeted its municipal activities and services relying on the collection of these amounts. Finally, Honda has moved its warehouse outside the municipal boundaries of Farmers Branch and is now not subject to municipal taxation by the respondent. Therefore, should this Court limit its decision in *Michelin*, Farmers Branch would be unable to collect any taxes for the municipal services rendered by it to the petitioner over the past five years.

In its final section, the petitioner attempts to persuade this Court to adopt a totally new judicial concept. It argues that all decisions which affect business relationships and transactions in any way, should be applied prospectively. This argument has repeatedly been rejected as an attempt to engraft upon a judicial decision the limitation placed upon legislation. It is well settled that legislation should have prospective effect, but that judicial decisions, except in extremely rare and unusual cases, should be applied without restriction.

CONCLUSION

For any and all of these reasons, a writ of certiorari should not issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ronald M. Mankoff, do hereby certify that a true and correct copy of the foregoing Respondent's Brief In Opposition To Petition For Writ of Certiorari was served on the Petitioner by hand delivering a copy thereof to its attorney of record, Marvin S. Sloman, Carrington, Coleman, Sloman, Johnson & Blumenthal, 3000 One Main Place, Dallas, Texas, this 27th day of August, 1976.

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